Supreme Court, U.S.
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No. 02 627 OCT 21 2002

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In The
Supreme Court of the United States

CIRILO LOPEZ ROMERO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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2H pd

QUESTION PRESENTED FOR REVIEW

I. WHETHER THE DECISION OF THE COURT OF APPEALS CONFLICTS WITH UNITED STATES v. DUNNIGAN, 507 U.S. 87 (1993) REGARDING THE APPLICATION OF U.S.S.G.§3C1.1.

II. WHETHER THE DUE PROCESS CLAUSE WAS VIOLATED BECAUSE THERE IS INSUFFICIENT EVIDENCE TO WARRANT A U.S.S.G. § 2D1.1 GUIDELINE ENHANCEMENT

INTERESTED PARTIES

There are no parties to the proceedings other than those named in the caption of the case.

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PETITION FOR WRIT OF CERTIORARI

Cirilo Lopez Romero respectfully petitions the Supreme Court of the United States for a writ of certiorari to review the judgement of the United State Court of Appeals for the Fourth Circuit rendered and entered in the 4th Cir. Case No. 01-4826 on June 6, 2002.

OPINION BELOW

A copy of the decision of the United States Court of Appeals for the Fourth Circuit, which affirmed the judgment and conviction of the United States District Court for the Middle District of North Carolina, is contained in Appendix A.

STATEMENT OF JURISDICTION

This Petition has been filed within 90 days of July 23, 2002, the date the United States Court of Appeals for the Fourth Circuit denied Romero's Petition For Rehearing, a copy of which is contained in Appendix B. See Sup. Ct. R. 13. The Court's jurisdiction is invoked under 29 U.S.C. § (1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Petitioner intends to rely on the following constitutional and statutory provisions:

U.S. Constitutional implicit right to testify

The right to testify on one's own behalf is an implicit right of the U.S. Constitution. See Rock v. Arkansas, 483 U.S. 44, 51-53 (1987); Nix v. Whiteside, 475 U.S. 157, 164 (1986).

U.S. Constitutional Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, nor shall any person...be deprived of life, liberty, or property without due process of law.

18 U.S.C. §3481

In trial of all persons charged with the commission of offenses against the United States...the person charged shall, at his own request, be a competent witness.

21 U.S.C. § 841

(a) Unlawful acts
Except as authorized by this subchapter, it shall be unlawful for any person knowing or intentionally--

(1) to manufacture, distribute or dispense, or process with intent to manufacture, distribute or dispense, a controlled substance...

(b) Penalties
Except as otherwise provided in section 859, 860, or 861 of this title any person who violates subsection (a) of this section shall be sentenced as follows:

(i)(A) In the case of a violation of subsection (a) of this section involving–

(ii) 5 kilograms or more of a mixture or substance containing a detectable amount of...cocaine...
such person shall be sentenced to a term of imprisonment, which may not be less than 10 years or more than life.

U.S.S.G. § 2D1.1 (b)(1)

If a dangerous weapon (including a firearm) was possessed, increase by 2 levels.

U.S.S.G. § 2D1.1, comment. (n.1)

The adjustment in subsection (b)(1) should be applied if the weapon was present, unless it is improbable that the weapon was connected with the offense.

U.S.S.G. § 3C1.1

If (A) the defendant willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice during the course of the investigation, prosecution or sentencing of the instant offense conviction, and (B) the obstructive conduct related to (i) the defendant's offense of the conviction and any relevant conduct; or (ii) a closely related offense, increase of the offense level by 2 levels.

U.S.S.G.§3C1.1, comment (n.2)

The provision is not intended to punish a defendant for the exercise of a constitutional right. A defendant's denial of guilt (other than a denial of guilt under oath that constitutes perjury), refusal to admit guilt or provide information to a probation officer, or refusal to enter a plea of guilty is not a basis for application of this provision. In applying this provision in respect to alleged false testimony or statements by the defendant, the court should be cognizant that inaccurate testimony or statements sometimes may result from confusion, mistake, or faulty memory and, thus, not all inaccurate testimony or statements necessarily reflect a willful attempt to obstruct justice.

U.S.S.G. § 3C1.1, comment. (n.4)

The following is a non-exhaustive list of examples of the types of conduct to which this adjustment applies:

(h) providing materially false information to a probation officer in respect to a presentence or other investigation for the court.

STATEMENT OF THE CASE

On October 30, 2000, Cirilo Lopez Romero was indicted by a federal grand jury in the Middle District of North Carolina along with eleven co-defendants. Romero was charged in count one with violation of 21 U.S.C. § 846, conspiracy to distribute cocaine hydrochloride; in count two with a violation of 18 U.S.C. § 1956 (h), money laundering conspiracy; in count three with a violation of use of a communication facility to facilitate a drug conspiracy in violation of 21 U.S.C. §812. (See District Court Docket Entry "DE"1).

On March 26, 2001, Romero executed his plea agreement. Romero pled guilty to counts one and two; with the stipulation that at least 15 kilograms but less than 50 kilograms of cocaine hydrochloride would be attributed to him in the conspiracy. (Id.) The plea agreement also provided that the government would recommend a three-level reduction of his guideline range for acceptance of responsibility pursuant to U.S.S.G. § 3E1.1 (a) and (b). (Id.)

Romero timely objected to the presentence investigation report ("PSR") recommendation that Romero's sentence be enhanced two-levels for possession of a dangerous weapon, pursuant to U.S.S.G. § 2D1.1 (b)(1) and a two level enhancement for obstruction of justice pursuant to U.S.S.G. § 3C1.1. (DE 202). At the sentencing hearing, Romero testified the probation office asked him during her PSR interview, if he had ever been convicted of a crime to which he responded "no". This incorrect answer was the result of confusion, mistake and faulty memory. Specifically, he explained he was confused as to the legal significance of his uncounseled misdemeanor conviction more than twenty years ago for unlawful entry over the Rio Grande River. He believed it to be an administrative immigration matter that did not involve a criminal

conviction. Romero also objected to the two-level enhancement for possession of a firearm on the ground that there was no factual basis in the record to show any geographic or temporal proximity between the weapons and the contraband in this case.

On June 6, 2002, the Fourth Circuit affirmed Romero's sentence in an unpublished per curiam opinion. See Appendix A. The Fourth Circuit held that the district court did not abuse its discretion by finding Romero's testimony at sentencing that he did not intend to deceive the probation office when he failed to disclose the prior conviction was not worthy belief. (Id.) Noting that the threshold for materiality is "conspicuously low," the Fourth Circuit found the district court's conclusion in this regard was not clearly erroneous. (Id.)

With respect to the firearm enhancement, the Fourth Circuit held that the district court's finding was not clearly erroneous. The court relied on the district court's finding of fact that a storage house in Houston, Texas "used by the organization" contained kilograms of cocaine and firearms. The district court also found that a small quantity of marijuana along with firearms seized from Romero's North Carolina residence likewise was sufficient to warrant the U.S.S.G. § 2D1.1 firearm enhancement. (Id.)

REASONS FOR GRANTING THE WRIT

I. THE DECISION OF THE COURT OF APPEALS CONFLICTS WITH UNITED STATES v. DUNNIGAN, 507 U.S. 87 (1993).

In United States v. Dunnigan, 507 U.S. 87, 95 (1993) this Court held that when a defendant offers testimony which proves to be false as the result of his confusion, mistake or faulty memory, he will not qualify for an

obstruction of enhancement of his guideline range pursuant to U.S.S.G. § 3C1.1. It is well settled that a person accused of a crime has a constitutional right to offer testimony in his own behalf. Rock v. Arkansas, 483 U.S. 44, 51-53 (1987); Nix v. Whiteside, 475 U.S. 157, 164 (1986); and 18 U.S.C. §3481. Furthermore, the ordinary task of the trial is to "sift true from false testimony" so that purported false information is not so much an obstruction of justice, as much as it is an expected part of the administration of justice. In re Michael, 326 U.S. 224, 228 (1945); Ex parte Hudgings, 249 U.S. 378, 383 (1919) For these reasons, this Court in Dunnigan at 93, held that false information or perjury does not reach the level of obstruction of justice, "unless the perjury is part of some greater design to interfere with judicial proceedings."

Consistent with the holding in Dunnigan, U.S.S.G. § 3C1.1 comment (n.2), provides pertinent part, as follows:

> In applying this provision in respect to alleged false testimony or statements by the defendant, the court should be cognizant that inaccurate testimony or statements sometimes may result from confusion, mistake or faulty memory, and, thus not all inaccurate testimony or statements necessarily reflect a willful attempt to obstruct justice.

It would be difficult to imagine circumstances more likely to create confusion, mistake or faulty memory than those present in the instant case. During his presentence investigation interview, the probation officer asked Romero if he had ever been convicted of a crime; he answered in the negative. Subsequently, a routine NCIC computer check revealed that more than twenty years prior to this interview Romero had pled guilty to a misdemeanor for unlawful entry into U.S. He did so without the benefit of counsel at his initial appearance before a magistrate in Del Rio, Texas.

Romero served three months detention with other illegal immigrants at a detention facility for illegal aliens, and then he was deported back to Mexico. Romero testified that he thought the matter was an "immigration" violation as opposed to a "criminal" offense. At the time of his detention he was an uneducated young man, who spoke no English. Subsequently, when Romero applied for U.S. residency in Charlotte, North Carolina, about a decade later, he was informed by a federal immigration official that the old immigration matter would not impede his ability to obtain U.S. residency. This information by a federal official added to Romero's confusion as to the legal nature of his detention in 1980 for an immigration violation.

In all other matters, Romero was absolutely honest during his PSR interview with the probation officer. Thus, she had no difficulty obtaining the twenty-year-old misdemeanor conviction, as indicated above. Furthermore, Romero had encouraged his codefendants to plead guilty and to accept responsibility; also he disclosed the existence of a piece of real estate otherwise undiscoverable to the government for forfeiture. In fact, the district court granted Romero a downward departure for acceptance of responsibility pursuant to U.S.S.G. 3E1.1. When Romero learned of his mistake he expressly apologized to the probation officer, through counsel who explained the nature of Romero's confusion arising from the lapse in time, his youth, his lack of education, the absence of legal advice, the incident in Charlotte, and the fact that illegal traffic over the Rio Grande often results in non-criminal sanctions.

At his sentencing hearing, Romero testified consistent with the above stated facts. The government offered no evidence to refute Romero's understandable to confusion regarding this immigration matter. Nonetheless, the district court found that Romero's explanation "unworthy of belief." The Fourth Circuit affirmed this

finding on the ground that it was not an abuse of discretion. That court also upheld the "materiality" finding of this error by Romero, even though the twenty-year-old misdemeanor had no impact on Romero's guideline range.

These findings by the Fourth Circuit are in conflict with its decision in United States v. Urrego-Linares, 829 F.2d 1234, 1239 (4th Cir. 1989). Urrego Linares, requires the government to prove by a preponderance of the evidence this guideline enhancement. Under the ruling in United States v. Romulus, 949 F.2d 713, 717 (4th Cir. 1991) the Fourth Circuit held that the U.S.S.G.§3C1.1 enhancement applied only where the government could prove that the defendant had specific intent to consciously obstruct justice. The record in this case is devoid of any such evidence of a specific intent to obstruct justice. Taken in context, it was an isolated error based on numerous circumstances; Romero demonstrate an intent to be forthright, especially by disclosing the existence of a piece of real estate that would have otherwise been unknown to the government for forfeiture.

The decision of the Fourth Circuit in this case conflicts with other decisions of its sister circuits. For example, in United States v. Brady, 928 F.2d 844, 854 (9th Cir. 1991), the Ninth Circuit held that an uncounted misdemeanor conviction is "simply not serious enough" to warrant an upward departure under the guidelines. In United States v. Tabares, 951 F.2d 405, 411 (1st Cir. 1991), the First Circuit held that a defendant who gave a false social security number to his PSR interviewer could not be enhanced under U.S.S.G. § 3C1.1, because there was no evidence that the error was willful. In United States v. Rodriguez, 942 F.2d 899, 902 (5th Cir. 1991), the Fifth Circuit held that the defendant's use of a false name did not significantly hinder the police investigation. In United States v. Yell, 18 F.3d 581, 583 (8th Cir. 1994), the Eighth

Circuit held that in light of the prior and subsequent truthful disclosures of amount of cocaine distributed one false statement to probation officer would not show intent to obstruct justice.

The mandate in Dunnigan, 507 U.S. at 95 requires the lower court to review the evidence and make an independent finding that there was a willful intent to obstruct justice. The opinion in Dunnigan, instructs lower courts to be careful when walking the line to distinguish between a deliberate intent to obstruct the administration of justice without intruding upon an accused's constitutional right to speak in his own behalf. A surgeon's scalpel should be used by the lower courts to cut out from this enhancement information, that which is false as the result of confusion, mistake or faulty memory. Here, the lower courts employed a broad sword to smash a defendant who did not have the specific intent to obstruct justice, but rather, was clearly confused regarding a twenty year old immigration matter, which occurred without counsel's advice while he was young and educated. If the limitation mandated Dunnigan regarding U.S.S.G. § 3C1.1 does not apply in this case, then it has no viable application of law.

II. THE DUE PROCESS CLAUSE WAS VIOLATED BECAUSE THERE WAS INSUFFICIENT EVIDENCE TO WARRANT A U.S.S.G. §2D1.1 ENHANCEMENT.

In McMillian v. Pennsylvania, 477 U.S. 79, 91-93 (1986) this Court held that the Fifth Amendment Due Process Clause requires proof by a preponderance of the evidence to warrant to employment of a sentencing guideline. In the instant case, the district court replied upon the PSR statement regarding a "stash house" in Houston, Texas that contained firearms and kilograms of cocaine and/or a very small amount of marijuana seized from the

defendant's along with firearms to support a U.S.S.G. 2D1.1 enhancement in this case. The Fourth Circuit affirmed on the ground that the district court's holding was not clearly erroneous.

The burden is on the government to establish, by the greater weight of the evidence, a spatial and temporal nexus between the defendant's possession and the crime charged. United States v. Khang, 904 F.2d 1219, 1221 (8th Cir. 1990). In the case at bar the small amount of the marijuana seized from the defendant's home was consistent with personal use not with a drug trafficking conspiracy to distribute under 21 U.S.C. § 841. As for the guns seized in Houston, Texas more than a thousand miles away from Romero's home in North Carolina, the evidence fails to show whose firearms they were, whether the possessor of the firearms was a member of the charged conspiracy or if the drugs seized at that location had any nexis to the crime charged. Neither speculation nor conjecture is sufficient to support the application of a sentencing guideline enhancement. United States v. Eirven, 987 F.2d 634 (9th Cir. 1993). Mere presence at a drug transaction or an association with drug trafficker does not prove a drug conspirator's responsibility. United States v. Maltas, 985 F.2d 743 (5th Cir. 1993).

CONCLUSION

For the foregoing reasons, the Petitioner respectfully requests that his Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit.

Respectfully submitted,

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APPENDIX

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Appendix to Petition

Appendix A:

Opinion
United States Court of Appeals
for the Fourth Circuit
entered June 6, 2002

Appendix B:

Order
United States Court of Appeals
for the Fourth Circuit
Re: Denial of Petition for Rehearing
entered July 23, 2002

UNPUBLISHED
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v. No. 01-4826

CIRILO LOPEZ ROMERO,
Defendant-Appellant.

Appeal from the United States District Court
for the Middle District of North Carolina, at Durham.
N. Carlton Tilley, Jr., Chief District Judge.
(CR-00-362)

Submitted: April 29, 2002
Decided: June 6, 2002
[Entered: June 6, 2002]

Before WILLIAMS and GREGORY, Circuit Judges, and
HAMILTON, Senior Circuit Judge.

Affirmed by unpublished per curiam opinion.

COUNSEL

Neil M. Nameroff, NEIL M. NAMEROFF, P.A., Miami, Florida, for Appellant. Anna Mills Wagoner, United States Attorney, Sandra J. Hairston, Assistant United States Attorney, Greensboro, North Carolina, for Appellee.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

OPINION

PER CURIAM:

Cirilo Lopez Romero pleaded guilty to one count of conspiracy to distribute in excess of five kilograms of cocaine, in violation of 21 U.S.C.A. §§ 841(a)(1), 846 (West 1999 & Supp. 2001), and one count of conspiracy to commit money laundering, in violation of 18 U.S.C.A. § 1956(a)(1)(A) (West 2000 & Supp. 2001). He appeals his sentence, specifically challenging the enhancement of his offense level under the Sentencing Guidelines* for obstruction of justice and possession of a dangerous weapon. We conclude that the district court correctly applied these enhancements, and we therefore affirm.

Romero first contends the district court erred in finding that he willfully obstructed justice when he failed to disclose a 1980 misdemeanor conviction in the Southern District of Texas for illegal entry. Section 3C1.1 of the Sentencing Guidelines provides for a two level increase in a defendant's offense level "[i]f (A) the defendant willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice during the course of the investigation, prosecution, or sentencing of the instant offense of conviction." U.S.S.G. § 3C1.1. "[P]roviding materially false information to a probation officer in respect to a presentence or other investigation for the court" is specifically listed as an example of conduct for which the enhancement is appropriate. U.S.S.G. § 3C1.1, comment. (n.4(h)). "Material" information is defined as "information that, if believed, would tend to influence or affect the issue under determination." U.S.S.G. § 3C1.1, comment. (n.6). Whether information is material is a factual matter

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* U.S. Sentencing Guidelines Manual (2000)

determined by the district court, and the district court's determination is reviewed by this court under the clearly erroneous standard. *See United States v. Hicks*, 948 F.2d 877, 886 (4th Cir. 1991).

The district court concluded that Romero's testimony at sentencing that he did not intend to deceive the probation officer when he failed to disclose the prior conviction was not worthy of belief. Evaluation of witness credibility is reserved to the finder of fact and is generally not subject to review by this court. *See United States v. Saunders*, 886 F.2d 56, 60 (4th Cir. 1989). Moreover, the district court's conclusion that Romero's prior conviction was a material fact is not clearly erroneous, as we have held that "[t]he threshold for materiality . . . is 'conspicuously low.'" *United States v. Gormley*, 201 F.3d 290, 294 (4th Cir. 2000) (quoting *United States v. Dedeker*, 961 F.2d 164, 167 (11th Cir. 1992)). Accordingly, the district court acted within its discretion by concluding that Romero willfully provided a materially false answer to the probation officer's question about his prior convictions and correctly applied the § 3C1.1 enhancement.

Romero next contends the district court improperly enhanced his offense level for possession of a firearm in connection with the drug trafficking offense. A two-level increase applies if a dangerous weapon is present during a drug trafficking crime "unless it is clearly improbable that the weapon was connected with the offense." U.S.S.G. § 2D1.1(b)(1), comment. (n.3). The district court's determination that a firearm or other weapon was present and justifies the enhancement is a factual question that is reviewed for clear error. *United States v. Apple*, 915 F.2d 899, 914 (4th Cir. 1990).

After Romero's drug distribution organization was discovered, a search of a house used by the organization for storage of drugs in Houston, Texas, resulted in the seizure of ten kilograms of cocaine, $42,300, and a 9mm handgun. A subsequent search of Romero's North Carolina residence yielded a small quantity of marijuana and four firearms. The district court found that Romero falsely testified that the firearms found in his residence were not connected to his drug distribution conspiracy and that he was unaware that co-conspirators in Houston possessed firearms. The district court noted that Romero's organization distributed drugs in North Carolina for several years and involved numerous individuals. Moreover, Romero admitted that drugs transported from Houston arrived at his North Carolina residence before being stored at other houses. This evidence is sufficient to support the district court's findings that the firearms found in Romero's North Carolina residence were possessed for protection of the drug distribution organization and its profits and that the firearm found in the Houston house was reasonably foreseeable to Romero. *See United States v. Kimberlin*, 18 F.3d 1156, 1159-60 (4th Cir. 1994); *United States v. White*, 875 F.2d 427, 433 (4th Cir. 1989).

Accordingly, we conclude that the district court properly applied the § 2D1.1(b)(1) enhancement to Romero's offense level.

We therefore affirm Romero's conviction and sentence. We dispense with oral argument because the facts and legal contentions are adequately presented in the material before the court, and argument would not aid the decisional process.

AFFIRMED

UNPUBLISHED
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 01-4826
CR-00-362

UNITED STATES OF AMERICA,
.intiff-Appellee,

v.

CIRILO LOPEZ ROMERO,
Defendant-Appellant.

[Entered July 23, 2002]

ORDER

Appellant has filed a petition for rehearing.
The Court denies the petition for rehearing.

For the Court,

/s/Patricia S. Connor
Clerk